

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 No. 1:07-cv-10066-MLW

4  
5  
6 VINCENT De GIOVANNI, on behalf of himself and all other  
7 similarly-situated individuals,  
8 Plaintiffs

9 vs.

10 JANI-KING INTERNATIONAL, INC., et al,  
11 Defendants

12 \*\*\*\*\*

13 For Hearing Before:  
14 Chief Judge Mark L. Wolf

15 Motion Session

16  
17 United States District Court  
18 District of Massachusetts (Boston)  
19 One Courthouse Way  
20 Boston, Massachusetts 02210  
21 Monday, August 16, 2010

22 \*\*\*\*\*

23 REPORTER: RICHARD H. ROMANOW, RPR  
24 Official Court Reporter  
25 United States District Court  
One Courthouse Way, Room 5200, Boston, MA 02210  
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1 P R O C E E D I N G S

2 (Begins, 2:30 p.m.)

3 THE CLERK: Civil Action 07-10066, Vincent  
4 Giovanni versus Jani-King International, Incorporated.  
5 The Court is in session. You may be seated.

6 THE COURT: Good afternoon. Would counsel  
7 please identify themselves for the Court and for the  
8 record.

9 MS. LISS-RIORDAN: Good afternoon, your  
10 Honor. For the plaintiff, I'm Shannon Liss-Riordan.

11 MS. BUNDY: Good afternoon, your Honor. For  
12 the defendants, my name is Kerry Bundy, and with me is  
13 Aaron Van Oort and Gregg Rubenstein.

14 THE COURT: Okay. We got bumped off track  
15 some since I saw you on March 1st and issued my order  
16 setting an agenda the next day, but in some respects you  
17 put the time to good use because I think the issues are  
18 narrower.

19 As I understand it, the present posture of this  
20 case is as follows.

21 The operative pleadings, the plaintiffs' second  
22 amended complaint, only Counts 2 and 3, the  
23 misclassification and wage law claims, remain. As far  
24 as I can see, Jani-King has not answered and there's no  
25 pending motion to dismiss. So a response to the

1 complaint has to be scheduled.

2 Then Judge Young certified a class with respect to  
3 the misclassification claim. The class is composed of  
4 all individuals who are Jani-King franchisees in  
5 Massachusetts. He said any time since January 12th,  
6 2004, but there's now a dispute as to whether the end of  
7 the class period should be the date of the  
8 certification, which I think was September 21, 2009, or  
9 the date of the class notice, which we'll be discussing.

10 Class counsel has not been appointed pursuant to  
11 Federal Rule of Civil Procedure 23(g). I believe  
12 there's no objection to Ms. Liss-Riordan and her  
13 colleagues being appointed.

14 I need to resolve two disagreements as relating to  
15 the proposed notice. One, the end date for the class  
16 period, and second, the degree to which, if any, the  
17 notice should inform franchisees about possible adverse  
18 consequences if they're determined to be employees.

19 I believe the motion for a stay or dismissal  
20 without prejudice of the Chapter 93(a) claims is moot.

21 The other motion that I intend to address today is  
22 the request for further discovery of the defendant under  
23 Rule 56(f). I think your agreement addressing the  
24 merits of the motion for summary judgment needs to wait  
25 until the opt-out period for the class has expired so it

1 will be clear who's bound by the judgment.

2 All right. To summarize that summary, my present  
3 intention is to schedule a time for Jani-King to respond  
4 to the second amended complaint, to appoint class  
5 counsel, um, to decide the issues regarding class notice  
6 and put it in a posture to be issued, and to hear you on  
7 and then decide the Rule 56(f) motion.

8 Have I accurately summarized where we are and what  
9 we ought to be focusing on today?

10 MS. BUNDY: Yes, your Honor.

11 THE COURT: All right. And then earlier today  
12 the plaintiff filed a supplementary authority, a brief  
13 decision from the Georgia **DePianti** case. Does that have  
14 any direct bearing or any bearing on the issues we'll be  
15 discussing?

16 MS. LISS-RIORDAN: It has somewhat of a direct  
17 bearing just in that it's another example of another  
18 court that determined, on summary judgment, that a  
19 so-called "franchisee" cleaning worker in Massachusetts  
20 is an employee. So now we have Judge Young's decision  
21 in the **Coverall** case, we have Judge Campbell's decision  
22 in the **Jan-Pro** case -- and we attached the briefing,  
23 just to show you that it is the same issue as we present  
24 here for Jani-King.

25 So the reason it's relevant to what we have on the

1 agenda for today is Jani-King has urged you that it  
2 needs more discovery in order to fight our summary  
3 judgment motion, yet we now have two courts determine  
4 it, without all of the discovery that Jani-King is  
5 claiming is necessary, but we say they've already had  
6 that discovery.

7 THE COURT: All right.

8 MS. LISS-RIORDAN: So we just got it on Friday  
9 but we wanted to put it to your attention right away.

10 THE COURT: Well, we'll get back to that under  
11 the Rule 56(f) analysis.

12 Am I correct that there's no response to the  
13 second amended complaint yet?

14 MS. BUNDY: We need to check that, your Honor,  
15 but if there's not, we will promptly submit one.

16 THE COURT: Okay. What's the minimum  
17 reasonable period of time for you to answer the  
18 complaint?

19 MS. BUNDY: We can do it in 10 days, your  
20 Honor.

21 THE COURT: Okay. So today is the 16th. Why  
22 don't we say by the 26th the defendant shall respond to  
23 the complaint.

24 Is it your intent to file an answer, not a motion  
25 to dismiss?

1 MS. BUNDY: Yes, that's correct.

2 THE COURT: Okay. By agreement, by that date,  
3 you'll file an answer to the second amended complaint.

4 Then, as I understand it, there's no objection to  
5 Ms. Liss-Riordan and her firm serving as lead counsel.  
6 That may have been implicit in what Judge Young did a  
7 year ago. But the standards require me to consider the  
8 work counsel's done in identifying or investigating  
9 potential claims, counsel's experience in handling class  
10 actions, the types of claims asserted, counsel's  
11 knowledge of the applicable law, and the resources  
12 counsel will commit. I'm inclined to believe those  
13 standards are fully met.

14 Does Jani-King want to be heard?

15 MS. BUNDY: We have no objection to that.

16 THE COURT: And, Ms. Liss-Riordan, do you want  
17 this appointment?

18 MS. LISS-RIORDAN: Um, yes, I do, your Honor.

19 THE COURT: And who should I say -- how should  
20 I articulate the appointment, by appointing the firm?

21 MS. LISS-RIORDAN: Yes, that would be fine.

22 THE COURT: Okay. All right. Then with  
23 regard to the class notice issues, you have two and I  
24 have two more. Mine are easier than yours, I think.

25 All right. With regard to the date on which the

1 class period should end, I believe that the defendant  
2 advocates September 21st, the date that Judge Young  
3 certified the class, and the plaintiff would like the  
4 class to go until the notice goes out. Do I understand  
5 it right?

6 MS. LISS-RIORDAN: Yes, that's right, your  
7 Honor.

8 THE COURT: All right. My present thinking is  
9 that the class period should end September 21, 2009,  
10 when it was certified. Judge Young certified a class  
11 of, quote, "individuals who have performed," past tense,  
12 "cleaning work."

13 All right. It's conceivable -- and neither Judge  
14 Young nor I had the information to address whether  
15 there's been any material change since last September,  
16 so I don't know that I have a factual basis to say that  
17 these last 11 months qualify for class certification.  
18 And in any event, this case is going to go on beyond  
19 today if Jani-King's still in the process of granting  
20 franchises, that there's going to be some universe of  
21 people who aren't in the class. So that's my present  
22 inclination.

23 But since I'm leaning against you, Ms. Liss-  
24 Riordan, would you like to be heard on that?

25 MS. LISS-RIORDAN: Well, it's a tricky issue



1 and we've been caught in the other direction on this,  
2 your Honor. I had a case that we tried in the state  
3 court and it was, I think, really by agreement we  
4 defined the class period prior to the trial just because  
5 everyone agreed there should be some finite period of  
6 time. And then later when we tried to bring a new claim  
7 for the post-class period, um, the judge in that case  
8 wouldn't allow us to do it because it should have just  
9 been done in the original case.

10 THE COURT: Well, you can't -- well, all  
11 right.

12 MS. LISS-RIORDAN: So that's why our argument  
13 was really one more of efficiency that what we may do is  
14 bring a new action and then starting in September to  
15 fill in the gap, and it could really be ongoing, I would  
16 say, until something changes.

17 THE COURT: Well, I guess the -- I now  
18 understand what animates your position, but, as I said,  
19 I mean, Judge Young couldn't have known what was going  
20 to happen in the future, if they changed their mode of  
21 operating in some material respect or -- I think that  
22 even if I certified the class as of the time of the  
23 notice, there would be people left out of it. So if  
24 you're going to have to bring another class action, then  
25 I believe it's most appropriate that it go back to

1 September 21, 2009.

2 So I'm going to certify the class as ending on  
3 that date. The class period, for the purpose of the  
4 notice and for the purpose of the case, will be January  
5 12th, 2004 until September 21, 2009.

6 All right. Then you have a dispute about the  
7 defendant's proposed description of the risk to a  
8 plaintiff of not opting out. As I understand it -- and  
9 it seems to me to be well stated as a general matter in  
10 the **Nissan** case, 552 F.2d 1688 at 1104, that "the notice  
11 must contain information a reasonable person would  
12 regard as material to make an informed decision on  
13 whether to opt out or remain a class member and that  
14 should be in a neutral" -- "expressed in neutral  
15 understandable terms."

16 My present intention, but again I'm going to give  
17 you a chance to be heard on it and to what the specific  
18 language is I propose, is that the positions of both  
19 parties regarding the risk of remaining a class member  
20 should be included. In other words, in language that --  
21 in language that I've drafted, as it's stating the  
22 defendant's position, but also the plaintiffs' position,  
23 that these contentions are without merit, they're  
24 unlawfully retaliatory, and making clear that the  
25 Court's expressing no view on these. But here, let's

1 mark this -- these sheets as Exhibit 1 for today's  
2 date. Here.

3 (Hands out.)

4 THE COURT: Why don't you take a look at this  
5 language and see if you have some thoughts on it.

6 (Pause.)

7 THE COURT: Have you had an opportunity to  
8 read that and do you want to be heard on it?

9 MS. LISS-RIORDAN: I understand what the Court  
10 is doing here and, um, I don't have a strenuous  
11 objection to it. I mean, I think our concerns are  
12 stated in the papers and I think you recognize that.

13 THE COURT: Yeah, I suppose -- and my thinking  
14 is, you know, if this -- you know, if this parade of  
15 horrors were to be a consequence of staying in the  
16 class and winning the case, that may well -- that would  
17 understandably be material to somebody. You know, it's  
18 your position that they've cited no authority for any of  
19 these assertions and it's just meant to be  
20 intimidating. I'm not in a position and I'm not  
21 supposed to, as I understand it, in issuing a class  
22 notice, to be opining on the merits of the parties'  
23 position, so I thought it was most appropriate to try  
24 to -- to try to restate your respective positions in  
25 hopefully an objective and neutral way and make it clear

1 to potential class members that the Court's not  
2 expressing a view on any of this.

3 MS. LISS-RIORDAN: I mean, I feel compelled  
4 just to reiterate my concern that it's giving some  
5 condoning or allowing Jani-King to say, "Oh, all of  
6 these things are going to happen to you," and we're  
7 saying -- we would challenge them and we don't believe  
8 they're going to happen. But it puts everyone on notice  
9 of the potential retaliation that could take place,  
10 which would then have counsel to be fighting on their  
11 behalf. But, I mean, that causes me concern. But I  
12 understand if the Court just wants to go with --

13 THE COURT: All right. The one thing I'm  
14 going to do -- now looking at it, I'm going to change  
15 it. The last sentence I'm going to make a separate  
16 paragraph because it's not just the parade of horrors  
17 I'm expressing no view on, it's the merits of the claim  
18 generally -- I mean, the claims generally, the whole  
19 thing. So -- actually, you must have the disk. Just  
20 make the last sentence a separate paragraph, please.

21 (Everyone writes.)

22 THE COURT: All right. Then I have two other  
23 observations.

24 MR. van OORT: Your Honor, may I be heard  
25 briefly on the notice?

1 THE COURT: If you stand up.

2 MR. van OORT: Thank you, your Honor. We have  
3 no objection to this, your Honor, and it is not Jani-  
4 King's intent to intimidate or threaten or anything. We  
5 read the rule to be the same as your Honor reads it,  
6 which is that people should be informed of things that  
7 they would find material and some of these follow  
8 directly from becoming reclassified as an employee. If  
9 you're going to argue that you have to be paid hourly,  
10 then people have to be paid hourly. And for the  
11 business owners here, especially those who employ  
12 multiple other people and receive gross revenues, that  
13 would be a material change for them. And so we think  
14 this is the right thing to do.

15 We share your Honor's concern about just wanting  
16 to make sure people are informed of this and one of the  
17 things we considered and that we would suggest for your  
18 Honor's consideration is you could perhaps add a  
19 sentence at the end saying "Class members are encouraged  
20 to seek advice on those potential consequences either  
21 from class counsel on counsel they're choosing." That's  
22 not the USRA requirement, but it would go further to  
23 saying that you aren't -- your Honor isn't taking a  
24 position. But that's the only suggestion that we have  
25 to what your Honor has proposed.

1 THE COURT: Do you want to be heard on that?

2 MS. LISS-RIORDAN: I don't think it's  
3 necessary. It's stated squarely in the notice that the  
4 class members have the right to seek counsel if they  
5 choose. I don't think that's --

6 THE COURT: I recall that it was in there and  
7 that's fine.

8 MS. LISS-RIORDAN: Yes.

9 THE COURT: And you also have the general  
10 statement in 4, that "The Court expresses no opinion on  
11 the merits of the lawsuit." It reiterates what I put  
12 in. But I think on this point some redundancy is okay.

13 I want a provision added which states what I  
14 believe is the law anyway, that "The Court reserves a  
15 right to alter deadlines established in the notice for  
16 good cause shown." I mean, sometimes, you know, I get a  
17 letter that says, "I was out of the country in the two  
18 months I was given to opt out. I was taking care of my  
19 sick mother in the Dominican Republic. I didn't find  
20 the letter until I came back." And I believe I have the  
21 authority to make an exception, but it should be  
22 explicit, but it should also put people on notice that  
23 there's got to be a good reason and you just can't miss  
24 the deadline after I decide on summary judgment and say  
25 "Oh, I meant to opt out of the class. I didn't see the

1 letter. I was busy." So you'll put that in.

2 All right. Then the last issue is dates. Do you  
3 feel that, say, two months is sufficient for all of  
4 this? How long is it going to take for somebody who's  
5 got the disk to get this back to me so I can sign off on  
6 it?

7 MS. LISS-RIORDAN: Oh, we can submit those  
8 promptly. You mean the final revised version?

9 THE COURT: Right.

10 MS. LISS-RIORDAN: We can submit it to you  
11 tomorrow.

12 THE COURT: Tomorrow?

13 MS. LISS-RIORDAN: Yes.

14 THE COURT: Okay. Why don't you have the  
15 dates run two months from this Friday then. And I'll  
16 ask Mr. O'Leary and my clerk to review it to make sure  
17 it complies with what I decided today and then I'll look  
18 at it, too, and sign it this week. Okay?

19 MS. LISS-RIORDAN: Thank you.

20 MR. van OORT: Thank you, your Honor.

21 THE COURT: Then -- well, I don't know if I  
22 mentioned this.

23 Plaintiffs' counsel proposes to send out a letter  
24 that was in the packet. I'm directing that the letter  
25 not be sent until the period to opt out ends. As far as

1 I could see, all the information in the letter is also  
2 in the notice and it's my understanding essentially that  
3 it's consistent with the idea that the notice is  
4 supposed to be neutral, not that the letter, in this  
5 case, isn't.

6 But, at the moment, these people are deciding  
7 essentially, Ms. Liss-Riordan, whether, you know, they  
8 want to be represented by you, by staying in the class,  
9 so the time to communicate with them independently would  
10 be after it's determined whether or not they're in the  
11 class. Okay?

12 MS. LISS-RIORDAN: That's fine, your Honor.  
13 And by the same token, would the Court -- that Jani-  
14 King, I presume, would not be permitted to be  
15 communicating with class members now without opting out.

16 THE COURT: That's my present intention. I  
17 mean, I'll hear you on this, but --

18 MR. van OORT: Your Honor, we have no  
19 intention to send any written communication to the  
20 members of the class regarding opting out or  
21 participating. As you know, many of them are current  
22 franchise owners of Jani-King and so they approach Jani-  
23 King on a daily basis about anything in the business.  
24 And, you know, we've instructed people about what they  
25 can and cannot say about this class and this litigation



1 in that action. But I just don't want to represent to  
2 your Honor that we aren't going to have any  
3 communications with the class members, because we have  
4 to.

5 THE COURT: And what do you think you can and  
6 cannot say?

7 MR. van OORT: Well, we've instructed people  
8 not to communicate with them about their decision to  
9 participate or stay in this class.

10 THE COURT: Right. I think what's most  
11 appropriate is -- and it sounds like it's compatible  
12 with what you're saying, is that, you know, "Jani-King  
13 can't advise you whether or not to stay in the class"  
14 and you can go further and say, you know, "If you want  
15 to talk to somebody about that, you can talk to the  
16 class lawyer who sent the notice."

17 MR. van OORT: That's consistent with what  
18 we're doing, your Honor.

19 THE COURT: All right. Then what I feel I  
20 particularly need to hear you on is this Rule 56(f)  
21 motion.

22 The First Circuit discussed the requirements for  
23 having a Rule 56(f) motion granted. "It must be  
24 timely," and I think that's satisfied. "It must show  
25 good cause for the failure to discover the necessary

1 facts sooner. It must set forth a plausible basis for  
2 believing that the necessary facts probably exist and  
3 can be learned in a reasonable time. And it must  
4 establish that the sought facts, if found, would  
5 influence the outcome of the pending motion for summary  
6 judgment." That's **Adorno**, 443 F.3d 122 at 127.

7 "Essentially a moving party must articulate a plausible  
8 reason to believe that discoverable material exists that  
9 will suffice to raise a triable issue," as the First  
10 Circuit went on to say in **Adorno**.

11 As I understand it, the statute that's at issue in  
12 the misclassification claim, Mass. General Law Chapter  
13 149, Section 148B, provides three things that the  
14 defendant, in this case, must prove to prove the -- to  
15 avail on the contention that the franchisees are  
16 independent contractors. The second one is at issue in  
17 the motion for summary judgment. The second part of the  
18 statute says, "service is performed outside the usual  
19 course of business of the employer."

20 The e-mails that have been submitted to me  
21 indicate that in August of 2009, before Judge Young  
22 acted on the motion to certify the class, the parties  
23 agreed that if the class was certified, that "some  
24 additional fact and expert discovery would be needed on  
25 any certified claim." On September 21, 2009, Judge

1 Young certified a class pursuant to an earlier  
2 scheduling order and, as I understand it, summary  
3 judgment motions were due October 1, 2009. The  
4 plaintiff filed for summary judgment on  
5 misclassification on a class-wide basis on that date.  
6 The defendant filed an opposition on October 29th, 2009  
7 and also moved for a stay pending appeal.

8 It's not perfectly clear to me what the defendant  
9 is looking for. I thought the first thing the defendant  
10 seemed to want was discovery from its own employees in  
11 order to demonstrate the nature of its business, and  
12 it's not clear to me whether you want discovery like  
13 depositions or whether you just want to file additional  
14 affidavits that you didn't file last October. And if  
15 it's affidavits, whether they were fact affidavits or  
16 expert affidavits as well.

17 So maybe I could get that clarification as to  
18 what's at issue in that first category.

19 MS. BUNDY: With regard to the discovery that  
20 we're looking for, your Honor, we're looking for both  
21 discovery of a limited number of class members as  
22 well --

23 THE COURT: Okay. I understand that. What  
24 discovery do you want about what Jani-King's own  
25 business is?

1 MS. BUNDY: Actually what we were seeking,  
2 your Honor, is -- well, no class certification discovery  
3 has occurred in this case and we believe that before  
4 summary judgment on any of the prongs that we conducted,  
5 we should have class discovery for all three of those  
6 prongs.

7 THE COURT: Well, I want to know what the  
8 discovery is because -- well, I don't know why you need  
9 discovery as to what your own business is?

10 MS. BUNDY: Well, if you're specifically  
11 referring to Prong II, your Honor, Prong II looks at  
12 both sides of the equation. If you look at the language  
13 it says "This service is performed by the putative  
14 employee outside the usual course of the business of the  
15 putative employer." So we're going to be looking for  
16 discovery both on what does Jani-King, as a franchisor,  
17 do and that will be our expert testimony as well as  
18 internal. We also want discovery on what that business  
19 of the franchise owner does and that would come from the  
20 class members.

21 We also think that the class members, during their  
22 depositions, will acknowledge that what Jani-King, as a  
23 franchisor, is doing, is substantively different than  
24 what they are doing.

25 THE COURT: Okay, let me go back. I'm trying

1 to break this down.

2 What discovery do you want from your -- about what  
3 your business is, what witnesses do you want to  
4 question, or don't you already know what your business  
5 is and perhaps you want to file more affidavits about  
6 it?

7 MS. BUNDY: Certainly, your Honor. With  
8 respect to what Jani-King's business as a franchisor is,  
9 that is within our realm.

10 THE COURT: Right.

11 MS. BUNDY: We'd like to expand on the  
12 deposition or the expert testimony of Mr. Seide. We  
13 perhaps will want to depose, um, someone from the  
14 International Franchise Association. We'll want to  
15 submit additional affidavits from our Jani-King  
16 International employees. And then we will want to  
17 supplement Donna Docrates's declaration, who is Jani-  
18 King of Boston.

19 THE COURT: Okay, let's do these one at a  
20 time.

21 So you want additional affidavits from employees,  
22 right?

23 MS. BUNDY: Correct. We want additional  
24 affidavit testimony from our expert, Mr. Seide.

25 THE COURT: Based on what?

1 MS. BUNDY: He's going to be talking about the  
2 franchising model and the differences between what Jani-  
3 King, as a franchisor, does and performs in the usual  
4 course of business as opposed to vis a vis what the  
5 franchisees do.

6 THE COURT: He already has an affidavit,  
7 correct?

8 MS. BUNDY: He has an affidavit in, correct,  
9 your Honor.

10 THE COURT: And so if you put in new facts by  
11 affidavit, is that going to require some supplementation  
12 of the opinions that -- regarding what Jani-King does by  
13 that expert?

14 MS. BUNDY: Yes, your Honor, there would be  
15 refinements.

16 THE COURT: So you want an additional  
17 affidavit from your employees and additional expert  
18 opinion based on those facts and that new information or  
19 additional information. And then what else do you  
20 want?

21 MS. BUNDY: We'd also like the opportunity to  
22 depose a third party, perhaps the International  
23 Franchise Association.

24 THE COURT: What, as an expert?

25 MS. BUNDY: As an expert in franchising,

1 correct, your Honor.

2 THE COURT: Yeah, I don't know that you can do  
3 that without going out and hiring them as an expert, but  
4 that's not going to happen at this point unless you give  
5 me some authority. You don't get free expert advice by  
6 noticing a deposition. The last time I had to contend  
7 with this, as I recall, was -- well, it was a long time  
8 ago. Go ahead.

9 MS. BUNDY: And then we'd like the class  
10 members' depositions, your Honor, as well as limited  
11 written discovery.

12 THE COURT: Well, actually, that -- all  
13 right. You want the class members' discovery on what  
14 Jani-King does or on what they do?

15 MS. BUNDY: Both, your Honor. We believe that  
16 if we take a limited number -- a sampling of those class  
17 members, they will be affirming the distinction between  
18 the functions performed, which is both what Jani-King  
19 does as well as what they do.

20 THE COURT: A "limited number" is how many?

21 MS. BUNDY: Um, we propose 10, your Honor.

22 THE COURT: And what kind of questions do you  
23 want to ask them about what Jani-King does? Or how  
24 would it -- I'm trying to --

25 MS. BUNDY: Well, sure, your Honor. We want

1 to flesh out what they do -- if you're talking about  
2 what Jani-King does, I want to flesh out that they  
3 acknowledge that Jani-King is a franchisor, that they  
4 were sold a franchise by Jani-King. That Jani-King's  
5 usual course of business is not cleaning the accounts,  
6 but it's actually working towards promoting and  
7 enforcing the brand name.

8 By contrast, I want to talk to them about the  
9 franchisors and what they do day to day and talk about  
10 how they clean the accounts, how they hire and fire and  
11 manage their employees --

12 THE COURT: But is any of this in dispute?  
13 Generally speaking, in order to have a valid 56(f)  
14 motion, it has to relate to some fact that's in  
15 dispute. The submissions the parties made, under our  
16 Local Rule 56.1, indicate to me that the parties are in  
17 agreement that the franchisees provide cleaning  
18 services, and so I didn't -- coming in here, perceive  
19 that more evidence is needed on what the franchisees  
20 do. But go ahead.

21 MS. BUNDY: I mean, if you look at it -- we're  
22 looking at this globally. I mean, if you recall, we  
23 came here in March. What we wanted to do is we said  
24 that there hasn't been any class discovery. There are  
25 three prongs. It's the defendants' burden of proof on



1 each of those prongs. We believe that there is  
2 testimony out there for all three prongs that will allow  
3 us to --

4 THE COURT: I know, but I'm -- this is what I  
5 do in complex litigation generally, and I do it in  
6 patent cases, is, you know, if there's one issue that's  
7 dispositive and can be done relatively efficiently, I'll  
8 take a motion for partial summary judgment, or if this  
9 is a motion for a full summary judgment, because I think  
10 you'll agree that the burden of proof on all three  
11 prongs is on you and if you lose on Prong II, the other  
12 two are not material to the outcome of the case. Is  
13 that right?

14 MS. BUNDY: I would agree with that, your  
15 Honor, but the reason we believe that there should be  
16 discovery on all three, though, and that the Court  
17 should consider them together is for purposes of having  
18 a full record and whether that full record is -- so if  
19 you decide for us on summary judgment, then you don't  
20 have them coming back on the other two prongs.

21 THE COURT: No, you would have to litigate the  
22 other two prongs, but I'm trying to determine whether --  
23 and usually I don't permit any motion for summary  
24 judgment until the end of all discovery, but, as I say,  
25 if I perceive that this is kind of a silver bullet in

1 the case, if the argument is meritorious, then I  
2 usually, or often, you know, I narrow the focus to that  
3 issue so that we can get to a properly-informed result  
4 more quickly.

5 MS. BUNDY: The other way to look at it, your  
6 Honor, is if there is this one issue and it is decided  
7 against Jani-King, that there will not be a full record  
8 for appeal, there's, you know, the one issue for appeal,  
9 which might lead to a remand of further proceedings.

10 THE COURT: It might lead to a settlement. It  
11 might --

12 MS. BUNDY: Judge, I guess, we believe that,  
13 even looking at Prong B alone, that what we're asking  
14 for, um, the deposition testimony as well as additional  
15 affidavits, will inform the Court into how it properly  
16 interprets Prong B in a way that's different than what  
17 the plaintiffs and Judge Young suggests. We believe  
18 that if -- that Judge Young interpreted it incorrectly.

19 THE COURT: And, in fact, one of the things --  
20 and I'm jumping ahead a bit, but in your second  
21 supplemental memorandum in support of your Rule 56(f)  
22 motion, you make about five new arguments that weren't  
23 made in summary judgment and weren't made previously.  
24 And it's my present intention, even if there's no  
25 discovery while these two months of opportunity for opt

1       outs exists, I'm going to have further briefing on those  
2       issues.

3               MS. BUNDY: We do believe, your Honor, that  
4       allowing us the chance to at least talk to the -- to ten  
5       of these class members, to be able to explain and show  
6       the Court that when you interpret the prong as we  
7       suggest, which is actually looking at their operations  
8       on a day-to-day level and seeing whether there are  
9       substantive functions that make them separate and  
10      distinct, that that testimony will be helpful in us  
11      proving our point on Prong B.

12             THE COURT: You already took the depositions  
13      of six or seven of the named plaintiffs, is that right?

14             MS. BUNDY: That's correct, your Honor. And  
15      those plaintiffs -- as you mentioned, those are  
16      plaintiffs that have been picked by counsel.

17             THE COURT: And did you ask them the kind of  
18      questions you want to ask the other ten?

19             MS. BUNDY: I was not personally involved in  
20      those depositions, your Honor, but some of those  
21      questions were asked.

22             THE COURT: Okay.

23             MS. BUNDY: The difference, your Honor, as  
24      Judge Young recognized in his class certification order,  
25      however, is that even if you have commonality and

1 typicality in a class, there are still differences. And  
2 we think it's important for Jani-King -- if we're  
3 talking about deciding this class-wide issue which is  
4 going to have an impact on over 300 franchise owners in  
5 Minnesota -- or in Massachusetts -- sorry, your Honor,  
6 I'm thinking of my home state, that you need to be able  
7 to see the full picture. And there are franchise owners  
8 out there who have multiple franchise employees working  
9 for them and therefore they are, not as the plaintiffs  
10 are contending, their employee, they are an employer of  
11 those employees doing the cleaning work. And we think  
12 that's critical for the analysis under Prong B  
13 particularly in reference to the AG guidelines set forth  
14 in 2008.

15 THE COURT: How long do you think it would  
16 take you to do this discovery?

17 MS. BUNDY: Obviously we don't want to start  
18 until the notice period is over, your Honor, because we  
19 don't want there to be any risk of influence of opt-ins  
20 or opt-outs. We believe we could get it done within  
21 four months.

22 THE COURT: Four months after the two months?

23 MS. BUNDY: Correct. If you think about it,  
24 your Honor, that's very targeted.

25 THE COURT: And that would be on all three

1       prongs?

2                   MS. BUNDY:   Correct.

3                   THE COURT:   And then all discovery would be  
4       complete?

5                   MS. BUNDY:   All discovery with respect to the  
6       common claims, your Honor, and what that means is with  
7       respect to Prongs A, B and C.

8                   THE COURT:   Right.

9                   MS. BUNDY:   Issues about whether, you know,  
10      they actually worked overtime or are subject to  
11      benefits, that would not be part of this discovery.

12                  THE COURT:   All right.   And you -- you haven't  
13      mentioned it yet, but the e-mails going back and forth  
14      in October of 2009 -- and I'm looking at one from  
15      Hillary Schwab to Aaron van Oort dated August 21, 2009.  
16      "To get things clarified," I guess Mr. Van Oort wrote,  
17      "You say agreed with time for class/damages discovery  
18      and experts if needed.   We understand this to mean that  
19      if a class is certified, the parties agree that some  
20      additional discovery on the merits by fact and expert  
21      discovery won't be needed.   What exactly it will look  
22      like will depend on what claims are certified."   That's  
23      part of it.   And then the next day, August 21,  
24      Ms. Schwab, Ms. Liss-Riordan's colleague, writes:   "I'm  
25      in agreement on Point 1 with the understanding that we

1 may need an additional expert to analyze class-wide  
2 damages."

3 MS. BUNDY: If I may supplement that, your  
4 Honor? You were very accurate in your rendition of the  
5 chronology there. The one thing I just want to  
6 particularly point out is that once the summary judgment  
7 was issued, before our opposition was due, we did file  
8 an emergency stay and as part of that emergency stay, it  
9 is included in our Rule 56(f) motion. Additionally --  
10 just kind of belt and suspenders, we sent three  
11 deposition notices to class counsel, which are three of  
12 the individuals that we would like to depose in this  
13 instance, in case, for some reason, our Rule 56(f) is  
14 not heard, and class counsel responded that those  
15 depositions could not go forward without written  
16 discovery and that they weren't available at the time  
17 given anyway.

18 So it's really no surprise that we're here today  
19 asking for this, because we've been asking for it -- we  
20 agreed to delay it, we asked for it, it didn't happen  
21 because of the time constraints and the posture of the  
22 case, and that's just what we want now.

23 THE COURT: All right. Ms. Liss-Riordan?

24 MS. LISS-RIORDAN: Yes, a number of points,  
25 your Honor.

1           The issue pertinent to the independent contractor  
2     statute has been fully --

3           THE COURT: I'm sorry. Could you talk into  
4     the microphone, please.

5           MS. LISS-RIORDAN: Yes, I'm sorry. The issue  
6     pertinent to the independent contractor statute analysis  
7     has been fully discovered, fully briefed, and has been  
8     pending for quite some time. What Jani-King is trying  
9     to do is get another bite at the apple, an opportunity  
10    to rebrief things and take depositions of 10 franchisees  
11    on issues that I don't think we have any dispute over.

12           It did depose seven franchisees during discovery,  
13    at the time only two of them were even plaintiffs, five  
14    of them were class members, and they may have been named  
15    plaintiffs as well. The issues that are before you on a  
16    summary judgment motion are legal issues, which numerous  
17    courts have decided as legal matters, and we've been  
18    citing to you the cases on this. And the discovery that  
19    they're taking about, they're not --

20           THE COURT: If it's summary judgment, they're  
21    only legal matters if there are no material facts in  
22    dispute.

23           MS. LISS-RIORDAN: The issues that Jani-King  
24    is describing it wants to develop in these 10  
25    depositions are issues that I don't think we have any

1     dispute over. We agree that the Jani-King -- that the  
2     franchisees perform cleaning services. We agree that  
3     Jani-King operates a business that provides all the  
4     behind-the-scenes work so that the cleaning business can  
5     be done. It's really a legal issue for to you decide  
6     whether Jani-King is in the business of providing  
7     cleaning services or whether Jani-King is in a different  
8     business. And I just really don't think we're in a  
9     disagreement about the facts.

10           THE COURT: Well, you know, just about a year  
11     ago today your colleague, Ms. Schwab, agreed that some  
12     factual and expert discovery would be necessary and  
13     appropriate if a class was certified. What should I do  
14     about that?

15           MS. LISS-RIORDAN: Here is what we meant. We  
16     were talking about class-wide damages. We served  
17     discovery asking for information on all the class  
18     members so we can calculate their damages. Our  
19     understanding was -- we agreed not to force Jani-King to  
20     turn over all their files until we got a class  
21     certified.

22           Now, if there was discussion in there -- and I  
23     don't know if there's e-mails, about merits discovery  
24     with respect to a class, I really think what we were  
25     talking about was this 93(a) claim when those related



1 claims were still in the case. They're not in the case  
2 right now.

3 So given the claim that is in the case, the  
4 independent contractor claim, I would submit that  
5 waiting another six months to do discovery on something  
6 that's been thoroughly covered is really just an  
7 unnecessary delay and an investment of more time and  
8 resources that is not going to move the ball forward.

9 (Pause.)

10 THE COURT: Okay. This is helpful in  
11 clarifying my understanding of your positions and what  
12 you're looking for. I'm going to take a break to think  
13 about it a bit. I'll be back.

14 Let me amplify, though, something I said earlier  
15 because, at a minimum, I feel I've been assisted by the  
16 following.

17 In the second supplemental memorandum in support  
18 of the 56(f) motion, Jani-King raises some arguments  
19 that I think are not briefed in connection with the  
20 motion for summary judgment. Jani-King argues that:  
21 "Broadly interpreting Prong II of the independent  
22 contractor statute would render superfluous the other  
23 two prongs, an outcome rejected by the Massachusetts  
24 Attorney General and the SJC," citing the AG's advisory  
25 of 2008/1, the **Athol Daily News** case, 439 Mass 171 at

1 178.

2 Second, Jani-King argues that "the Massachusetts  
3 legislature that defines 'course of business' in other  
4 statutes have distinguished between companies playing  
5 different roles in a franchise distribution system,"  
6 citing **Commonwealth vs. Jon Pierre**. Jani-King argues  
7 that Chapter 93(b), Sections 1 and 10, define different  
8 levels of automobile sales franchises as being in  
9 different businesses.

10 Third, Jani-King argued that "the plaintiffs'  
11 construction would result in the absurd consequence of a  
12 prohibition on all franchising."

13 Fourth, Jani-King argues that "the legislative  
14 history underlying Section 148B(a)(2) does not show that  
15 anybody contemplated plaintiffs' broad construction."

16 And, fifth, Jani-King argues that "other  
17 Massachusetts statutes and cases treat franchisees as  
18 separate business entities rather than employees."

19 Ms. Liss-Riordan, are those -- maybe I should --  
20 well, I'll ask Jani-King.

21 Are these arguments that you hope I'll consider  
22 when I get to the motion for summary judgment?

23 MS. BUNDY: Absolutely, your Honor.

24 THE COURT: And why weren't they made last  
25 October?

1 MS. BUNDY: Because they are brought about by  
2 Judge Young's overly-broad interpretation of Prong B,  
3 which frankly I don't think any of us anticipated.

4 THE COURT: And that interpretation is where,  
5 in **Coverall**?

6 MS. BUNDY: In the **Coverall** decision, your  
7 Honor, where essentially Judge Young states that  
8 franchising as a business model is not a valid business  
9 model and if any two entities are working together to  
10 bring a brand to the market, that they are in an  
11 employment relationship.

12 THE COURT: And when was the **Coverall**  
13 decision?

14 MS. BUNDY: March.

15 THE COURT: Of this year?

16 MS. BUNDY: Right.

17 THE COURT: After the briefing?

18 MS. BUNDY: Yes, your Honor.

19 THE COURT: All right. So Jani-King wants to  
20 supplement, at minimum, its summary judgment papers to  
21 incorporate these arguments and, if I let them do it --  
22 I mean, you want an opportunity to respond to them,  
23 I assume?

24 MS. LISS-RIORDAN: Sure, we'd be happy to  
25 respond to them, but it's really not necessary to reopen

1 discovery for us to respond to them.

2 THE COURT: All right. Here, let me take a  
3 recess and ponder this further. The Court is in  
4 recess.

5 (Short recess, 3:20 p.m.)

6 (Resumed, 3:35 p.m.)

7 THE COURT: Okay. It is, for yet another  
8 reason, unfortunate that this case is on its third  
9 judge. We miss Judge Lindsay, Judge Young had one way  
10 of dealing with it, but my rulings are as follows.

11 I'm allowing the Rule 56(f) motion in part. I'm  
12 ordering -- with regard to evidence concerning the  
13 defendant's own usual course of business, that doesn't  
14 require any discovery. This came into clearer focus.  
15 That's an issue on which the defendant wants to file  
16 additional factual and expert affidavits. Given how  
17 quickly the motion for summary judgment was filed after  
18 the class certification, on September 21, 2009, it's  
19 appropriate to permit that.

20 So the additional -- any additional affidavits  
21 concerning facts on that issue shall be filed by  
22 September 17 and any additional expert affidavits on  
23 that issue shall be filed by the defendant on October  
24 22.

25 After the -- the opt-out period will end, and I'm

1 now refining what I said earlier, on October 22, and  
2 after October 22 and before January 14, 2011, the  
3 defendant may take discovery from up to five class  
4 members regarding the Chapter 149, Section 148B(a)(2)  
5 issue, the second prong. If you want to ask those class  
6 members some additional questions on the other two  
7 prongs, you may, but I'm not considering this a deadline  
8 for discovery on all three prongs. This second prong  
9 may indeed be the silver bullet. And in that same  
10 period, the plaintiffs, if they wish, can take discovery  
11 from the defendants' fact and expert witnesses, the  
12 people who filed affidavits on the Prong 2.

13 With regard to the motions for summary judgment, I  
14 expect you're going to be updating what you've submitted  
15 to integrate the new factual record, so the -- I'm  
16 denying the pending motion for summary judgment without  
17 prejudice. The defendant -- I'm sorry. The plaintiff  
18 shall file the renewed motion for summary judgment on  
19 what we'll call "Prong 2" by, say, February 11th, in the  
20 manner required by Local Rule 56.1. The response shall  
21 be filed on March 11. If there's going to be any reply,  
22 it should be filed by March 18. And I'll aim to give  
23 you a hearing on March 29 at 3:00.

24 I'll issue an order memorializing all this, but is  
25 there more you'd like to get clarification of?

1 MS. BUNDY: Your Honor, just one point. With  
2 our expert declaration, because our expert will be  
3 looking at the facts of some of the individual  
4 franchisors, the class members who we will not be  
5 deposing until October 22nd or January 14th, we request  
6 the opportunity to have that declaration December 1.

7 THE COURT: Well, December 1 doesn't help  
8 you. No. I thought he was going to be addressing the  
9 issue of the usual course of your business based on the  
10 new facts. How does December 1 help you?

11 MS. BUNDY: Well, I think he's going to want  
12 to take some of the facts from the class members that we  
13 developed to show what those class members are doing vis  
14 a vis the usual course of business of a franchise owner.

15 THE COURT: Well, he can file two declarations  
16 then, affidavits. He can do one on the date I gave you  
17 and the other one by, you say, December 1st? You think  
18 you're going to have the five of them discovered by  
19 December 1st?

20 MS. BUNDY: Well, your Honor, I was just  
21 trying to get something.

22 THE COURT: No, this is important. There's  
23 been enough ambiguity, enough loopholes in tripping up  
24 the progress of this case and so I don't want that. But  
25 I want them to know what your expert says the

1       implications of your witnesses -- your employees are by  
2       the date I established.

3               With regard to the second, he can file any updated  
4       declaration by January 21st, 2011, to incorporate  
5       whatever discovery you've received from the five class  
6       members and give an opinion on the implications of that.

7               MS. BUNDY: Thank you, your Honor.

8               THE COURT: Does the plaintiff anticipate  
9       wanting or needing an expert?

10              MS. LISS-RIORDAN: I really don't think it's  
11       necessary to go down this road.

12              THE COURT: Well, we're down it and -- we'll  
13       get a record and --

14              MS. LISS-RIORDAN: I really never anticipated  
15       having an expert on this issue. I suppose if they're  
16       putting in an expert, once we see it, if we decide we  
17       want to do an expert, we would want that opportunity,  
18       but I just don't know that --

19              THE COURT: Yeah, and I think I'll put that in  
20       my order. If you see their expert declarations and move  
21       for an opportunity to respond that you don't, at the  
22       moment, feel you're going to need, you can do that. I'm  
23       likely to allow it. And you know it will just  
24       necessitate some further delay, and I know you don't  
25       like the delay, but you'll be in a position to make an

1 informed decision once you see what more their expert  
2 has to say.

3 And as I say, I know it's hard for you to go from  
4 judge to judge to judge and it's hard for me to pick up  
5 something that's been through two of my colleagues, so  
6 -- but here we are, another regrettable consequence of  
7 Judge Lindsay's passing.

8 MS. BUNDY: Your Honor, one last thing. I'm  
9 assuming when you said the date of February 11th, 2011,  
10 that both sides could move for summary judgment on Prong  
11 B at that point?

12 THE COURT: Sure.

13 MS. BUNDY: Thank you.

14 THE COURT: Or if you look at the evidence and  
15 see there's not a proper basis, just file a statement  
16 saying "We're not moving for summary judgment. We can  
17 see material facts are in dispute. Here's a proposed  
18 schedule." Okay? And if Ms. Liss-Riordan, at that  
19 point, sees a material disputed fact -- and perhaps it  
20 would be unprecedented in her personal experience, but  
21 things happen. Okay?

22 The Court is in recess.

23 (Ends, 3:45 p.m.)  
24  
25



## C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER,  
do hereby certify that the foregoing record is a true  
and accurate transcription of my stenographic notes,  
before Chief Judge Mark L. Wolf, on Monday, August 16,  
2010, to the best of my skill and ability.

/s/ Richard H. Romanow 08-18-10

\_\_\_\_\_  
RICHARD H. ROMANOW Date